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IN THE

Supreme Court of the United States

OCTOBER TERM 1944.

No. 606

NATIONAL SURETY CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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NATIONAL SURETY CORPORATION,
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v.

UNITED STATES OF AMERICA,
Respondent.

No.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The petitioner National Surety Corporation prays that a writ of certiorari issue to review a judgment of the Circuit Court of Appeals for the Fifth Circuit (R. 51) entered June 20, 1944, affirming a judgment (R. 15) of the United States District Court for the Southern District of Texas, Houston Division. A petition for rehearing was duly filed on July 5, 1944 (R. 52) which was denied by order entered July 18, 1944 (R. 57).

Action was instituted by the United States of America for the recovery of $1,000 on a bond given by National Surety Corporation as surety for Georgios Pateras, master of the *SS. Marouka Pateras,* against whom a fine of $1000 had been administratively imposed on account of the desertion of an alien member of the crew of his vessel. The District Court granted judgment for the plaintiff and on appeal the Circuit Court of Appeals affirmed.

Jurisdiction.

The order on mandate below was entered on July 18, 1944. Jurisdiction of this Court is provided by 28 U. S. C. s. 347 (a).

Opinions Below.

The opinion of the Circuit Court of Appeals was written by Judge Hutcheson, Judges McCord and Waller concurring (R. 43). Neither that opinion nor the opinion of the District Judge has been reported. The opinion of District Judge Kennerly appears at pages 15, 21 of the record and that of the Court below at pages 43, 51 of the record.

Statutes and Regulations Involved.

The statutes and regulations primarily involved are sections 3 (5), 19, 20 (a), 15 and 24 of the Immigration Act of 1924, Executive Order 8429 of June 5, 1940, Acts of May 22, 1918, March 2, 1921, Rule 7 of the Immigration Rules and Regulations, and sections 15 and 16 of the Immigration Act of 1917, the pertinent portions of which are set forth in an appendix hereto.

Questions Presented.

1. Whether a surety on a bond to secure clearance of a vessel of the principal pending determination of liability of the principal for an immigration fine, may invoke the defenses of the principal in an action against the surety where the principal was not made a party.

2. Whether a notice to detain an alien seaman under Executive Order 8429, (appendix p. 17) can be invoked for a fine under Section 20 (a) of the Immigration Act of 1924, (appendix p. 15) notwithstanding the fact that the Immigration Act of 1924 does not grant any authority to the President to issue orders and regulations relating to immigration.

3. Whether a boarding inspector, as distinguished from the immigration officer in charge at the port of arrival can issue a valid notice to detain, as the basis for a fine under Section 20 (a) of the Immigration Act of 1924.

The Facts.

The facts were stipulated by the parties (R. 10, 12). The stipulated facts show that on arrival of the *SS. Marouka Pateras* in Bolivier Roads, Texas, the alien seaman Salvador Pauruga was ordered detained on board the vessel by a boarding inspector of the immigration service for the sole and only reason that he was not in possession of an identifying travel document in the nature of a passport as required by Executive Order 8429. He had complied with all requirements of the Immigration laws and regulations in that he was a bona fide seaman serving on the vessel as an employee thereof, had signed on her articles in good faith; his name appeared on the duly visaed crew list of the vessel and he entered the United States solely in connection with the business of the vessel as a bona fide seaman with no intention of abandoning his calling, thus showing full compliance with all provisions of the immigration laws and regulations, and particularly all requirements of Immigration Act of 1924. If he had had a document in the nature of a passport he would have been granted shore leave.

After his detention he escaped from the ship despite diligent and customary efforts to detain him.

A notice of fine was issued and served on the master and clearance of the vessel was denied by the Collector of Customs until the master posted a bond with National Surety Corporation as surety. Thus the bond was exacted under duress.

Subsequently a fine of $1,000 was imposed by administrative action and suit was brought against the surety, but not against the principal, to recover the amount of the fine.

The District Judge considered that defenses available to the principal were open to the surety, but granted judgment for the plaintiff on erroneous reasons that were not sustained or discussed by the Appellate Court.

Decision of the Court of Appeals.

On this record the Circuit Court of Appeals affirmed the judgment of the District Court, primarily on the ground that the defendant surety company could not avail itself of defenses that might be available to the principal, on the fallacious theory that liability had become fixed on the bond solely by reason of the fact that a notice to detain had been issued by an immigration inspector and the seaman had escaped from the vessel.

Secondarily, the Court held that even if the surety could invoke defenses of the principal, no valid defenses existed.

Defenses That Were Available.

The following defenses were available to the principal on the bond:

1. Section 20 (a) of the Immigration Act of 1924, (appendix pp. 15, 16) under which the fine was imposed, as supplemented by sections 19, 15 and 24, (appendix pp. 15, 16) contemplated fines only when there was a failure of compliance with Rule 7 of the regulations under the Act, (appendix pp. 19, 20). The seaman admittedly met all those requirements, and no basis existed for the issuance of a notice to detain.

2. Executive Order 8429, (appendix p. 17) which it is contended was based on a non existent statute, (appendix pp. 19, 20), made an additional condition to shore leave, i.e. the possession of a passport or document of that nature. Whether valid or not, the Executive Order could only be enforced through the sanction, if any, provided in the law on which it is based. It did not and could not invoke any authority in the Immigration Act of 1924 and could not be enforced through that Act.

3. Finally, Section 20 (a) of the Act of 1924, provides for fines for failure to detain a seaman if the detention is required by "the immigration officer in charge at the port of arrival" or the Secretary of Labor. No such notice to detain was issued. It was issued by a boarding inspector and consequently was invalid. Sections 15 and 16, Immigration Act of 1917, (appendix p. 21).

Reasons for Granting Writ.

1. The decision of the Court below is in conflict with decisions of other Federal Courts as follows:

a. With the Circuit Court of Appeals for the Fourth Circuit in *National Surety Co.* v. *Holtzman*, 43 F. (2d) 544, 546; the Circuit Court of Appeals for the 2nd Circuit in

United States v. *Columbus Marine Corporation,* 62 F. (2d) 795, 796; *Bank Line Ltd.* v. *United States,* 96 F. (2d) 52, 54, and *Durning* v. *McDonnell,* 86 F. (2d) 91, as well as the general law of suretyship, Stearns on Suretyship, 3rd Ed. Sec. 102 and 21 R. C. L. 974, in holding that defenses available to the principal are not available to his surety.

b. In principle, with the decision of the Circuit Court of Appeals for the First Circuit in *Johnson* v. *Keating,* 17 F. (2d) 50, 52 and an Opinion by Attorney General Jackson, 39 Op. 509, 515, 516, in holding that a fine could be validly imposed under Section 20 (a) of the Immigration Act of 1924 on the basis of a notice to detain that was issued solely under the provisions of Executive Order 8429.

c. With a decision of the Court of Claims in *Rio Cape Line* v. *United States,* 89 Ct. Cls. 307, 316, 317, in holding that a fine may be imposed on the basis of a notice to detain by a boarding inspector instead of the immigration officer in charge.

2. The application of Executive Order 8429 by boarding inspectors has resulted and will continue to result in severe and unjust hardships and losses to steamship owners and operators, through interference with the operations of vessels, the expenses involved in attempts to comply with detention notices and huge fines, often amounting to many thousands of dollars on a single arrival, on account of the desertion of seamen who have been ordered detained by a boarding inspector solely on the basis of Executive Order 8429. Consequently the importance of the issues involved is not confined to this case, but extends to all owners and operators whose ships call at ports of the United States with alien crews.

3. Our allies in the present war have been the principal victims of the application that has been made of

Executive Order 8429. Their war efforts have been seriously impeded by the incarceration of large bodies of seamen aboard, with resulting mutiny, or discontent, plus fines of $1000 per man for all who succeeded in escaping from their guards, and the seaman themselves have suffered the indignity of forcible detention for no crime other than failure to have a passport, a document which never before had been required for shore leave of alien seamen. Under the immigration laws it was necessary for the crew list of alien seamen to be visaed by an American Consul. In this case and practically all others that requirement had been fulfilled. Congress in passing the 1924 Immigration law certainly could not have contemplated the disgraceful situation that has been created by the administrative application of section 20 (a) of that act to enforce the provisions of Executive Order 8439. The question presented is one of serious public importance which warrants the consideration of this Court.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the decree of the Circuit Court of Appeals for the Fifth Circuit should be granted.

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BRIEF IN SUPPORT OF PETITION.

FIRST POINT

THE DECISION BELOW THAT DEFENSES OF THE PRINCIPAL WERE NOT AVAILABLE TO THE SURETY IS IN CONFLICT WITH DECISIONS IN THE SAME TYPE OF CASES BY THE CIRCUIT COURTS OF APPEAL FOR THE SECOND AND FOURTH CIRCUITS AND THE GENERAL LAW ON SURETYSHIP.

In *National Surety Co.* v. *Holtzman, supra,* at p. 546, which was an action against the surety alone for the recovery of deserting seaman fines, the Court said in part:

> "* * * As far as the immigration authorities were concerned, the fine had been determined and assessed, and the present proceedings were properly brought to test the legality of such determination and assessments, * * *
>
> "* * * The ship, because of the giving of the bond, is released and is not within the jurisdiction of the court, and a proper determination of all issues involved can be had in the present trial."

In *United States* v. *Columbus Marine Corporation, supra,* at p. 796, the Court said:

> "Nevertheless, the bond secured only valid fines, and if there were none, it was not forfeited."

And in *Bank Line Ltd.* v. *United States,* which was an action by the shipowner to recover the same type of fine, recovery was denied on the ground that the payment of the fine was voluntary and that the owner's recourse was to defend an action on the bond. The Court said, p. 54:

> "* * * However, there is this difference between a deposit and a bond: that the owner is forced to make the deposit to clear his ship, and therefore acts under

> duress; while a bond is merely a promise to pay and in an action upon it the obligor can raise the invalidity of the fine."

To the same effect is *Durning* v. *McDonnell, supra.*

In a lengthy note on the law of suretyship in 21 R. C. L., at p. 974, it is stated in part:

> "A cause of action cannot exist against a surety, as such, unless a cause of action exists against his principal. This rule results as a corollary, from the very definition of the contract of suretyship, that the obligation of the surety being accessory to the obligation of the principal debtor or obligor, it is of its essence that there should be a valid obligation of such principal, and that the nullity of the principal obligation necessarily induces the nullity of the accessory. And as a general rule the obligation of the surety, as such, cannot exceed that of the principal, it being said that it would be most unjust and incongruous to hold the surety liable, where the principal is not bound."

The decision of the court below on this point, therefore, is contrary to the settled law and should be corrected.

SECOND POINT.

THE DECISION BELOW WAS ERRONEOUS IN THAT IT HELD THAT A FINE ARISES AUTOMATICALLY UNDER SECTION 20(a) OF THE IMMIGRATION ACT OF 1924 IF AN ALIEN SEAMAN ESCAPES AFTER BEING ORDERED DETAINED REGARDLESS OF THE BASIS OF THE NOTICE TO DETAIN AND THAT EXECUTIVE ORDER 8429 COULD BE ENFORCED THROUGH FINES IMPOSED UNDER SECTION 20 OF THE IMMIGRATION ACT OF 1924.

The cardinal error committed by the Court below was in assuming that a fine arose automatically under Section

20(a) of the Immigration Act of 1924 (appendix p. 15) simply on a showing that an immigration inspector had issued a notice to detain an alien seaman and that the seaman had escaped, without regard to the basis for the notice to detain or the authority of the person who issued it.

The difficulty apparently arose from the fact that Section 20(a) itself does not specify the reasons on which a notice to detain may be issued, but Section 19 (Appendix p. 15) provides for the admission of seamen pursuant to regulations of the Secretary of Labor, and Sections 15 and 24 of the same Act (Appendix p. 21) provide that seamen and other non-immigrants may enter the United States pursuant to regulations made by the Commissioner General of Immigration with the approval of the Secretary of Labor (now Attorney General). Such regulations had been prescribed by the officers designated. Those concerning seamen are set forth in Rule 7, the pertinent provisions of which appear in the Appendix pp. 19, 20. Neither the law nor the regulations thereunder required an alien seaman to have a passport as a condition to shore leave.

Furthermore, regulations have been prescribed under which the Immigration Service is required to serve a notice in writing on the person sought to be charged with a fine under Section 20(a) and such person is granted 60 days within which to submit evidence against the fine to a designated body in the Central Office, now known as the Board of Immigration Appeals.

The Circuit Court of Appeals for the Second Circuit took notice of these regulations in *United States* v. *Columbus Marine Corporation*, 62 F. (2d) 795, 797, and stated that they had the force of law. Although these regulations were before the Court below they were completely ignored by the Court in reaching its conclusion that a fine automatically arose on a showing that a notice to detain had been

issued and that the seaman had escaped. Such a conclusion is contrary to *Compagnie Generale Transatlantique* v. *Etting,* 298 U. S. 217, in which this Court held there was no liability on procedural grounds.

After holding that the petitioner could not invoke the defenses of its principal the Court proceeded with a casual discussion of the defenses that were alleged to be available to the principal, and held that they were without merit.

The stipulation of facts conceded that Pauruga met all of the requirements for shore leave under the Immigration Act of 1924 and all of the regulations issued pursuant thereto. The only question was whether the seaman was properly denied shore leave for the sole reason that he was not in possession of a passport or document of that nature as required by Executive Order 8429 of June 5, 1940 which was not issued under the Immigration Law, and was issued only 5 days before the ship's arrival.

Executive Order 8429, by its own terms, relied for its authority solely on an Act of May 22, 1918, (appendix p. 18) as extended by the Act of March 2, 1921, (appendix p. 19). It did not claim authority from the Immigration laws and did not suggest that it was to be enforced through those laws.

Obviously it could not be supported by the Act of May 22, 1918, because that Act permitted executive action only when the United States was at war, a condition which did not exist on June 5, 1940 when the Executive Order was issued.

The Act of March 2, 1921 was an appropriation act and did nothing more than to continue in effect that part of the Act of May 22, 1918 which related to passport and visa requirements for aliens until otherwise provided by law.

Three years later the Immigration Act of 1924 was passed which by its terms and the regulations thereunder

comprehensively fixed all documentary requirements for the entry of aliens into the United States, whether quota or non-quota. By that Act, the Act of March 2, 1921, which was to remain in force "until otherwise provided by law" was superseded. *Johnson* v. *Keating* (CCA 1) 17 F. (2d) 50, 52; Opinion of Attorney General Jackson, 39 Op. 509, 515, 516. See also *Flora* v. *Rustad* (CCA 8) 8 F. (2d) 335 and *United States* v. *One Airplane &c.* (D.C.S.D. Cal.) 23 F. (2d) 500.

Consequently, Executive Order 8429 had no statutory basis; it could not have invoked the Immigration Act of 1924 because that Act limited the promulgation of rules and regulations to the then Department of Labor, now the Department of Justice. But even assuming that the Executive Order had some valid existence as a directive to enforcement officers, it could not form the basis of a fine under Section 20(a) of the Immigration Act of 1924, because that section contemplated fines only in the case of seamen who did not comply with the requirements of the regulations issued as provided by that Act, and they did not require a passport or document of that nature as a condition to shore leave.

In short, the Executive Order was based on an Act of 1918 that was not then in effect and an appropriation Act of 1921 which was superseded by the Immigration Act of 1924 and which, in any event was only a regulatory measure which did not provide any penalty for its violation. This was pointed out in *Flora* v. *Rustad, supra,* where it was said, p. 337 that by the 1921 Act certain provisions of the 1918 Act were "retained for regulatory purposes, without any legislative expression on the subject of criminal liability for entry without a passport". And further, "it was to regulate entry, not to punish those who violated the regulations."

Certainly the Executive Order cannot be construed to go beyond the acts on which it is expressly founded to enforce penalties that were not provided in those acts.

THIRD POINT.

THE DECISION BELOW WAS ERRONEOUS AND IN CONFLICT WITH THE COURT OF CLAIMS IN HOLDING THAT A FINE COULD BE BASED ON A NOTICE TO DETAIN ISSUED BY A BOARDING INSPECTOR INSTEAD OF THE IMMIGRATION OFFICER IN CHARGE AT THE PORT, AS REQUIRED BY THE STATUTE.

The only statutory powers granted to boarding inspectors are found in Sections 15 and 16 of the Immigration Act of 1917 (8 U. S. C. 151, 152) Appendix p. 21. Their only function is to permit entry if satisfied that the alien is entitled to enter. If they are in doubt, they have no power to prohibit entry but are required to have the alien detained for examination by a Board of Special Inquiry, which is the body through which the immigration officer in charge acts in such matters. Consequently, a notice to detain by a boarding inspector is invalid and cannot form the basis for a fine.

This view has the support of the Court of Claims in *Rio Cafe Line* v. *United States,* 89 Ct. Cls. 307, 316, 317. An earlier decision, *Lloyd Royal Belge* v. *Elting,* 61 F. (2) 745, took a contrary view notwithstanding the plain language of the statute.

Conclusion.

Because of the importance of the questions involved and of the diverse views taken by the Courts on most of them, petitioner respectfully submits that a writ of certiorari should be granted as prayed in order that the questions presented may be definitely and finally determined.

Respectfully submitted,

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APPENDIX

Sections 3, 19, 20(a), 15 and 24, Immigration Act of 1924 (8. U. S. C., Secs. 203, 166, 167, 215, 222):

"SEC. 3. When used in this act the term 'immigrant' means any alien departing from any place outside the United States destined for the United States, except * * * (5) a bona fide alien seaman serving as such on a vessel arriving at a port of the United States and seeking to enter temporarily the United States solely in the pursuit of his calling as a seaman, * * *."

Note. This section specifies five other classes of aliens who are not deemed immigrants.

"SEC. 19. No alien seaman excluded from admission into the United States under the immigration laws and employed on board any vessel arriving in the United States from any place outside thereof, shall be permitted to land in the United States, except temporarily for medical treatment, or pursuant to such regulations as the Secretary of Labor may prescribe for the ultimate departure, removal, or deportation of such alien from the United States."

"SEC. 20. (a) The owner, charterer, agent, consignee, or master of any vessel arriving in the United States from any place outside thereof who fails to detain on board any alien seaman employed on such vessel until the immigration officer in charge at the port of arrival has inspected such seaman (which inspection in all cases shall include a personal physical examination by the medical examiners), or who fails to detain such seaman on board after such inspection or to deport such seaman if required by

such immigration officer or the Secretary of Labor to do so, shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of $1,000 for each alien seaman in respect of whom such failure occurs. No vessel shall be granted clearance pending the determination of the liability to the payment of such fine, or while the fine remains unpaid, except that clearance may be granted prior to the determination of such question upon the deposit of a sum sufficient to cover such fine, or of a bond with sufficient surety to secure the payment thereof approved by the collector of customs."

"SEC. 15. The admission to the United States of an alien excepted from the class of immigrants by clause (2), (3), (4), (5), or (6) of section 3, or declared to be a non-quota immigrant by subdivision (e) of section 4, shall be for such time as may be by regulations prescribed, and under such conditions as may be by regulations prescribed (including, when deemed necessary for the classes mentioned in clause (2), (3), (4), or (6) of section 3, the giving of bond with sufficient surety, in such sum and containing such conditions as may be by regulations prescribed) to insure that, at the expiration of such time or upon failure to maintain the status under which admitted, he will depart from the United States."

"SEC. 24. The Commissioner General, with the approval of the Secretary of Labor, shall prescribe rules and regulations for the enforcement of the provisions of this act; but all such rules and regulations, in so far as they relate to the administration of this act by consular officers, shall be prescribed by the Secretary of State on the recommendation of the Secretary of Labor."

EXCERPTS FROM EXECUTIVE ORDER 8429.

Documents Required of Bona Fide Alien Seamen Entering in the United States.

"By virtue of and pursuant to the authority vested in me by the act of May 22, 1918, 40 Stat. 559, as extended by the Act of March 2, 1921, 41 Stat. 1205, 1217, I hereby prescribe the following regulations governing the entry of alien seamen into the United States:

Part I.

Not pertinent.

Part II.

* * * * * *

An alien seaman who is not exempt from the passport and visa requirements under Part I hereof shall be required to present an identifying travel document in the nature of a passport, showing his nationality and identity and bearing his fingerprints, before he may be granted shore leave for any purpose. The travel document shall be surrendered to the immigration authorities by each seaman at the time of landing and returned to him, upon personal application, at the time of departure.

As used in this order, the term "United States" shall include the territories of Alaska and Hawaii, the District of Columbia, Puerto Rico and the Virgin Islands.

The Secretary of State and the department head charged with the administration of the immigration laws are hereby authorized to make such additional rules and regulations, not inconsistent with this order, as may be deemed necessary for carrying out the provisions of this order and the statutes mentioned therein.

This order shall take effect immediately and shall supersede and cancel Executive Order No. 7797[1] of January 26, 1938, entitled "Documents Required of Bona Fide Alien Seamen Entering the United States".

FRANKLIN D. ROOSEVELT.

The White House,
June 5, 1940.

[No. 8429]

[F. R. Doc. 40-2263; Filed, June 6, 1940; 10:25 a.m.]

ACT OF MAY 22, 1918. PERTINENT SECTIONS.

"§223. *War-time restrictions generally.* When the United States is at war, if the President shall find that the public safety requires that restrictions and prohibitions in addition to those provided otherwise than by this section, and the three following, be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or Congress, be unlawful —

"(a) for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President shall prescribe;

"(b) For any person to transport or attempt to transport from or into the United States another person with knowledge or reasonable cause to believe that the departure or entry of such other person is forbidden by this section and the three following; * * *"

[1] 3 F. R. 216.

"§225. *Penalty for violation of war-time restriction.* Any person who shall willfully violate any of the provisions of the two preceding sections, or of any order or proclamation of the President promulgated, or of any permit, rule, or regulation issued thereunder, shall, upon conviction, be fined not more than $10,000, or, if a natural person, imprisoned for not more than twenty years, or both; and the officer, director, or agent of any corporation who knowingly participates in such violation shall be punished by like fine or imprisonment, or both; and any vehicle or any vessel, together with its or her appurtenances, equipment, tackle, apparel, and furniture, concerned in any such violation, shall be forfeited to the United States. (May 22, 1918, c. 81, §3, 40 Stat. 559.)"

ACT OF MARCH 2, 1921.

"227. *Regulations as to alien passport requirements continued.* The provisions of the Act approved May 22, 1918, being the four preceding sections, shall, in so far as they relate to requiring passports and visas from aliens seeking to come to the United States, continue in force and effect until otherwise provided by law. (Mar. 2, 1921, c. 113, §1, 41 Stat. 1217.)"

EXCERPTS FROM RULE 7, IMMIGRATION RULES AND REGULATIONS REVISED TO DECEMBER 31, 1936.

SUBDIVISION A.

"PARAGRAPH 1. The term "alien seaman" shall include every alien signed on the ship's articles and employed in any capacity on board any vessel arriving in the United States from any foreign port or place. Only such aliens who come within this definition shall be treated in the special manner herein specified.

PAR. 2. As used in subdivision 5 of section 3 of the Immigration Act of 1924, the term "bona fide alien seaman" means any alien who in good faith is signed on the articles of a vessel arriving at a port of the United States from any place outside thereof, employed in any capacity on board such vessel, and seeking to enter the United States temporarily solely in the pursuit of his calling as a seaman, with the intention of departing with the vessel or reshipping on board any other vessel for any foreign port or place.

* * * * * * *

SUBDIVISION E.

* * * * * * *

PAR. 6. An alien seeking to enter the United States pursuant to the provisions of subdivision (5) of section 3 of the Immigration Act of 1924 shall establish to the satisfaction of the proper immigration official at the port of arrival (1) that he is a bona fide seaman; (2) that his name appears on the duly visaed crew list of the vessel on which he arrives; (3) that he is an employee of such vessel and in good faith signed on her articles; (4) that he seeks to enter solely on business of such vessel, or that he seeks to enter solely in pursuit of his calling as a seaman; and (5) that he has no intention to abandon such calling; and where such immigration official is not so satisfied he shall order the owner, charterer, agent, consignee, or master of the vessel on which such alien arrives to detain such alien on board and deport him in the manner required by law: *Provided,* That an alien seaman whose name is not included on a visaed crew list may be allowed to land, if otherwise entitled to land, upon the permission of the Secretary of State.

SUBDIVISION H.

PAR. 2. Where, for any cause, the immigration official in charge of any port of arrival finds that any alien employed on board any vessel arriving in the United States from any place outside thereof should be detained on such

vessel or deported, he shall forthwith serve or cause to be served on the owner, charterer, agent, consignee, or master of such vessel a notice in writing to detain or deport such alien, which notice shall set forth the full name of such alien, and in such case an officer of the Immigration shall be detailed to verify the departure of such alien."

EXCERPT FROM SECTION 15, IMMIGRATION ACT OF 1917, 8 U. S. C. 151.

SEC. 15. "That upon the arrival at a port of the United States of any vessel bringing aliens it shall be the duty of the proper immigration officials to go or to send competent assistants to the vessel and there inspect all such aliens, or said immigration officials may order a temporary removal of such aliens for examination at a designated time and place, * * *".

EXCERPT FROM SECTION 16, IMMIGRATION ACT OF 1917, 8 U. S. C. 152.

"SEC. 16. * * * Every alien who may not appear to the examining immigrant inspector at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for examination in relation thereto by a board of special inquiry. * * *"

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 606

NATIONAL SURETY CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 43–51) is reported at 143 F. (2d) 831.

JURISDICTION

The judgment of the circuit court of appeals was entered June 20, 1944 (R. 51), and a petition for rehearing (R. 52–56) was denied July 18, 1944 (R. 57). The petition for a writ of certiorari was filed October 17, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. A notice to detain an alien seaman on board ship because he did not possess a passport as required by Executive Order 8429 was served on the master of a foreign ship which docked at an American port. The principal question presented is whether the failure of the master to comply with the order constituted a violation of Section 20 of the Immigration Act of 1924.

Subordinate questions raised by the petition are:

2. Whether the circuit court of appeals held that petitioner, as surety, was not entitled to invoke any defense available to the principal.

3. Whether it was appropriate for the Boarding Officer of the United States Immigration Service to issue the order to detain on behalf of "the immigration officer in charge at the port of arrival."

STATUTES AND EXECUTIVE ORDER INVOLVED

The pertinent statutes and Executive Order No. 8429 are set forth in the appendix, *infra,* pp. 18–21.

STATEMENT

On January 22, 1942, a complaint (R. 4–8) was filed by the United States in the United States District Court for the Southern District of Texas alleging that petitioner, as surety, delivered to the collector of customs for the Port of Houston, Texas, a bond as security for the payment of lia-

bilities incurred by one Georgios Pateras, Master of the SS *Marouka Pateras,* pursuant to the provisions of the Immigration Act of 1924 (*infra,* p. 19). It was further alleged that the condition of the bond had been broken in that the principal failed to pay to the collector of customs a fine of $1,000 imposed by the Secretary of Labor under the provisions of the Immigration Act of 1924, although the principal had been notified of the fine and demand had been made upon him (R. 8). In answer, petitioner alleged (R. 8–9) "that the bond was executed and delivered for the purpose of permitting the clearance and sailing of the SS *Marouka Pateras,* a Greek vessel, which up to that time had been denied clearance because of the alleged escape of a seaman as to whom the Immigration Authorities had purported to have issued a detention order; that the detention order served in respect of such escaped seamen was not valid or lawful and, in the alternative, even if valid or lawful the failure to obey or carry out the terms of such detention order did not and could not validly impose upon the master of the vessel, or his surety, liability for the penalty, said seaman not having been detained for any reason or cause set forth in the Statute authorizing the penalty."

The facts were stipulated (R. 10–12, 41–42) and may be summarized as follows:

The SS *Marouka Pateras* under command of the Master, Captain Georgios Pateras, arrived in

Bolivar Roads, Texas, on June 10, 1940. Included in its crew was one Salvador Pauruga, "a bona fide alien seaman" whose entry into the United States "was solely in connection with the business of the vessel or in pursuit of his calling as a bona fide seaman." The master of the vessel was ordered to detain Pauruga on board the ship by the Boarding Officer of the United States Immigration Service "by written order for the sole and only reason that he failed to have an identifying travel document in the nature of a passport as required by Executive Order No. 8429 of June 16 [5] 1940." Despite "guards and diligent customary efforts" to detain Pauruga, he escaped ship. Notice of Liability for Fine and a Bill and Notice of Fine were served on the Master on June 25, 1940, "for failure to detain such seaman as ordered to do, in violation of Section 20 (a) of the Act of May 26, 1924." On August 12, 1940, Pateras gave the bond in question in order that he might obtain clearance of his ship prior to the determination of whether a penalty would be imposed, and on November 5, 1940, a fine of $1,000 was administratively determined to be due and payable "solely upon the basis of the aforesaid Executive Order No. 8429."

On October 5, 1942, the district court entered findings of fact and conclusions of law (R. 15–21), and on January 4, 1943, judgment in the sum of one thousand dollars was entered in favor of the

United States (R. 28–29). On appeal to the Circuit Court of Appeals for the Fifth Circuit that judgment was affirmed (R. 51).

ARGUMENT

It is undisputed that the sole basis for the order to detain the alien seaman Pauruga on board ship was his failure to possess a passport as required by Executive Order 8429, promulgated June 5, 1940, pursuant to the authority vested in the President by the Act of May 22, 1918 (*infra,* p. 20), as extended by the Act of March 2, 1921 (*infra,* pp. 20–21); and it is likewise undisputed that that order was violated. Petitioner's principal contention (Pet. 3, 5, 6, 9–13) is that the order was void as having been predicated on an Executive Order which "was based on a nonexistent statute" (Pet. 5); in support of this contention petitioner argues that the statutes upon which the Executive Order is founded were repealed by the Immigration Act of 1924.

Section 20 of the Immigration Act of 1924 (*infra,* p. 19), requires specified persons, including the master of a ship arriving in the United States, to detain on board the ship (1) all alien seamen until the immigration officer in charge at the port of arrival has inspected such seamen, and (2) after such inspection to detain any such seaman on board or to deport him if required to do so by the immigration inspector or the Attor-

ney General. In the words of this Court, "The purpose of the section is to prevent aliens from unlawfully gaining entrance into the United States under the guise of seamen, and to this end it makes provision for detention on board, both temporary and continued, and for imposing fines on those who, when under a duty to detain, fail to do so." *Compagnie Generale* v. *Elting,* 298 U. S. 217, 222. As the court below held (R. 45–47, 49–50), Section 20 imposes an absolute duty upon a master who has been properly served with an order to detain an alien seaman, and if for any reason the seaman is not detained a fine of $1,000 may be administratively imposed. *Lloyd Royal Belge Societe Anonyme* v. *Elting,* 61 F. (2d) 745 (C. C. A. 2), certiorari denied, 289 U. S. 730; *British Empire Steam Navigation Co.* v. *Elting,* 74 F. (2d) 204 (C. C. A. 2), certiorari denied, 295 U. S. 736; *Indemnity Insurance Co. of North America* v. *United States,* 74 F. (2d) 22 (C. C. A. 5). In this case (see *supra,* p. 4) it is not disputed that an official immigration inspector at the port of arrival boarded the ship, inspected the seamen, and issued to the master of the ship an order to detain the alien seaman Pauruga. He was not detained, and, in order that the ship might secure clearance prior to the determination of the master's liability for violating the detention order, petitioner, pursuant to Section 20, posted the bond which is the subject of the present litigation. Thereafter

administrative proceedings were had and a fine of $1,000 was imposed upon the master (see R. 13–15). In these circumstances, the notice to detain and its violation having been established, we submit that the fine was properly imposed. Petitioner contends (Pet. 3, 5–6, 8–9), however, that in the suit on the bond upon default of the principal it was entitled collaterally to attack the detention order and show that it was predicated upon an illegal Executive Order. The court below was of the view that Section 20 "does not contemplate inquiry into the grounds of the order" and that it does not at all limit the authority of the Immigration officer to require the detention of a seaman on board" (R. 49). The cases relied upon by petitioner were properly distinguished (R. 48, 49–50) on the ground that they hold only that "the giving and service of the order are essential, and that whether it was given and served may be inquired into;" they do not hold that the reasons for the order may be subjected to inquiry. However, assuming, *arguendo,* that the basis of the order may be collaterally reviewed, we think it clear, as did the court below (R. 50–51), that inquiry into the ground for the order shows that it was properly issued.

As we have shown the detention order was predicated on Pauruga's failure to possess a passport as required by Executive Order 8429 (*infra,* p. 21). That Executive Order was promulgated by

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the President pursuant to the authority vested in him by the Act of May 22, 1918, as extended by the Act of March 2, 1921. The 1918 statute empowered the President, "when the United States is at war," to regulate, *inter alia,* the entry of aliens into the United States (*infra,* p. 20). And the 1921 Act continued the provisions of the earlier statute "in so far as they relate to requiring passports and visas from aliens seeking to come into the United States * * * until otherwise provided by law" (*infra,* pp. 20–21). The nub of petitioner's argument is that with the enactment of the Immigration Act of 1924 the earlier statutes and the President's authority under them were superseded. This argument overlooks a vital distinction between immigrants and nonimmigrants which we think must be recognized in determining the scope of the Immigration Act of 1924. The Act defines the term "immigrant" (sec. 3, *infra,* p. 18) and requires that such persons shall have identifying travel documents (Secs. 2, 6–9, 8 U. S. C. 202, 206–209). Consequently, we agree with petitioner that as to such persons the 1918 and 1921 Acts no longer have any application.

We are not concerned here, however, with an immigrant. Rather, it is clear that the seaman Pauruga was not an "immigrant" within the meaning of the 1924 Act, for in the definition of "immigrant" Congress explicitly excluded "a bona fide alien seaman serving as such on a vessel

arriving at a port of the United States and seeking to enter temporarily the United States solely in pursuit of his calling as a seaman" (Sec. 3). The Act contains no express requirements that nonimmigrants like Pauruga, who do not seek admission into the United States permanently or for any extended period but only seek permission to land while their ship docks at harbors in the United States, shall possess identifying travel documents. Furthermore, while the Act authorizes the promulgation of regulations for various specified purposes (see *infra,* pp. 18, 19), we think that there is serious doubt that the Act also authorizes the issuance of regulations of the nature of Executive Order 8429. The regulations authorized to be issued by Section 15 (*infra,* p. 18) relate to non-immigrants who seek to remain in the United States for fixed periods of time or during the continuation of a status which entitled them to admission and it requires that the regulations promulgated shall be "to insure that at the expiration of such time or upon failure to maintain the status under which admitted, he will depart from the United States." Section 19 (*infra,* pp. 18–19), which permits an alien seaman to land "pursuant to such regulations as the [Attorney General] may prescribe for the ultimate departure, removal or deportation of such alien from the United States," is in all material respects the same as its predeces-

sor, Section 32 of the Immigration Act of 1917,[1] and we think it authorizes regulations providing for the removal and deportation of an alien seaman from the United States. It is to be noted that in construing Section 32 of the 1917 Act it was held that the section did not authorize a regulation requiring an alien seaman to post a bond as a condition to landing temporarily in the United States. *United States* v. *Stump,* 292 Fed. 354 (C. C. A. 4). Even more important is the fact that despite the existence of the regulatory power granted by Section 32 of the 1917 Act the President believed it necessary to promulgate Executive Order 8429 under the authority conferred upon him by the 1918 and 1921 Acts, so that the entry of alien seamen into the United States could be controlled by requiring travel documents of them. Finally, Section 24 (*infra,* p. 19) authorizes the issuance of regulations for the enforcement of "the provisions of this Act." But since, as we have shown, the Act does not pur-

[1] Section 32 of the Immigration Act of 1917 (39 Stat. 895) provided:

"No alien excluded from admission into the United States by any law, convention, or treaty of the United States regulating the immigration of aliens, and employed on board any vessel arriving in the United States from any foreign port or place, shall be permitted to land in the United States, except temporarily for medical treatment, or pursuant to regulations prescribed by the Secretary of Labor providing for the ultimate removal or deportation of such alien from the United States, * * *"

port to require alien seamen to possess travel documents as a condition of temporarily entering into the United States, regulations requiring such documents could not appropriately be predicated on Section 24.

Our view of the scope of the 1924 Act is supported by the administrative construction of the Act. Regulations requiring travel documents have not been predicated upon the 1924 Act; instead, Executive Order 8429, which was promulgated long after the 1924 Act became law, specifically states that it rests on the authority conferred upon the President by the 1918 and 1921 Acts. While extensive regulations have been promulgated by the Attorney General relating to the entry of alien seamen into the United States, they rely upon Executive Order 8429 for the requirement that alien seamen shall possess specified travel documents. Thus Regulation 120.21 provides that an alien seaman, under specified conditions, may be temporarily admitted if "he is in possession of a passport, or some other document in lieu thereof, which is acceptable under the applicable Executive Order and regulations prescribing the documents required of alien seamen and which satisfactorily establishes his identity and nationality."[2]

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[2] Regulation 120.21 (8 C. F. R. Cum. Supp. 2704–2705) provides in part:

"(a) Any alien who upon arrival establishes that he is a bona fide seaman as defined in section 120.2, is admissible as a

In these circumstances, we submit that as to alien seaman the 1918 and 1921 Acts are entitled to be given full force and effect and that Executive Order 8429 is properly predicated upon those statutes. *United States* v. *Phelps,* 22 F. (2d) 288 (C. C. A. 2); *United States ex rel. Komlos* v. *Trudell,* 35 F. (2d) 281 (C. C. A. 2), certiorari denied, 280 U. S. 607; *United States* v. *Karnuth,* 30 F. (2d) 242 (C. C. A. 2); *Bennedsen* v. *Nelson,* 2 F. (2d) 296, 298 (D. Minn.). Neither *Johnson* v. *Keating,* 17 F. (2d) 50 (C. C. A. 1), nor the opinion of Attorney General Jackson, 39 Op. A. G., 509, 515–516, relied upon by petitioner, are inconsistent with this view. The *Johnson* case was concerned with travel document requirements applicable to an *immigrant* and the court was careful to limit its holding to that situation: "We

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nonimmigrant under section 3 (5) of the Immigration Act of 1924 and is not inadmissible under the other provisions of this part and of Part 175, may be temporarily admitted for such period of time as the examining immigrant inspector shall designate, not to exceed, however, the time the vessel on which the alien arrives remains in the United States and in no event to exceed 30 days, if

"(1) His name appears on the duly visaed crew list of the vessel on which he arrives, unless such vessel is excepted from the requirement of submitting a visaed crew list under the applicable Executive order and regulations prescribing the requirements for crew list visas; and

"(2) He is in possession of a passport, or some other document in lieu thereof, which is acceptable under the applicable Executive order and regulations prescribing the documents required of alien seamen and which satisfactorily establishes his identity and nationality. * * *"

think that the act of 1924 * * * now contain[s] (*so far as our present problem is concerned*) provisions of law excluding any power otherwise vested in the President under the act of 1921, and that Congress had 'otherwise provided by law,' when the [President's] proclamation was issued." (17 F. (2d) at 53. Italics supplied.) Likewise, the opinion of the Attorney General, relying on the *Johnson* decision, concluded only that the "1921 act is no longer applicable with respect to immigrants."

In respect of petitioner's argument that Section 20 does not contemplate a detention order based on Executive Order 8429 it should be noted that all of the immigration laws and regulations constitute a uniform plan and that they must be read as a whole in determining the scope of each provision. *Lloyd Royal Belge Societe Anonyme* v. *Elting, supra.* To insure this result Section 25 of the Immigration Act of 1924 provides:

> The provisions of this Act are in addition to and not in substitution for the provisions of the immigration laws, and shall be enforced as a part of such laws, and all the penal or other provisions of such laws, not inapplicable, shall apply to and be enforced in connection with the provisions of this Act. An alien, although admissible under the provisions of this Act, shall not be admitted to the United States if he is excluded by any provision of the immigration laws other than this Act, and an alien,

> although admissible under the provisions of the immigration laws other than this Act, shall not be admitted to the United States if he is excluded by any provision of this Act.

Viewed in this light, we think it clear that Section 20 contemplates the enforcement of every detention order, regardless of whether it is issued because of a failure to comply with the terms of the Immigration Act of 1924 or with the terms of other immigration laws or regulations *in pari materia* with that Act and not inconsistent with it. As the court below held (R. 50–51), Executive Order 8429 is perfectly consistent with the 1924 Act and the regulations issued thereunder; petitioner makes no showing to the contrary. Thus, we submit, violation of a detention order, such as that here involved, which is predicated on a failure to comply with the Executive Order supports the imposition of the penalty prescribed by Section 20 to the same extent as it would if the order were predicated on the 1924 Act or the regulations issued thereunder. In this respect it is to be noted that the penalty imposed upon the master was for violation of Section 20 of the Immigration Act of 1924, not for violation of Executive Order 8429. Consequently, it is plain that petitioner's argument (Pet. 5) that the Executive Order may be enforced only through the sanctions provided in the law upon which it is based is beside the point.

2. Petitioner also urges (Pet. 2, 5–6, 8–9) that the decision of the court below is in conflict with decisions of other circuit courts of appeals which are construed by petitioner as holding that defenses available to the principal in an action such as this one are likewise available to the surety. A short answer to this contention is that while the court below did advert to the general rule that the surety may plead any defense available to the principal and the exception to the rule that the surety "is not excused where the principal when sued takes advantage of a matter of defense which is altogether of a personal character or where the extinction of the principal's obligation arises from a cause which originates in the law" (R. 49), it did not predicate its decision on any such rule. Rather, it concluded that no one, not even the principal, was entitled to make the defense which petitioner asserted and that even if it were assumed that the defense could be made, it was without merit. We submit, there is no occasion for inquiring into the question whether, if a defense to a suit on the bond were open to the principal, petitioner, as surety, would be entitled to make it.

3. Section 20 of the Immigration Act of 1924 requires the master to detain on board ship every alien seaman until he has been inspected by the immigration officer in charge at the port of arrival and it provides that the master shall detain

a seaman on board after such inspection if required "by such inspection officer." Relying on a dictum in *Rio Cape Line Limited* v. *United States*, 89 Ct. Cls. 307, 316–317, that the statute must be literally complied with, petitioner contends (Pet. 3, 5, 6, 13) that the order to detain Pauruga was invalid because it was issued by a boarding inspector acting on behalf of the immigration officer in charge rather than by the latter personally. This contention we submit is predicated upon a wholly unrealistic approach to the functions of the immigration officer in charge of a port. The Act imposes many and varied duties upon him and it is obviously impossible for him personally to perform all of them. Thus, for example, if several ships docked at the same port on the same day he could not personally perform the duties imposed upon him by Section 20 alone even assuming that he disregarded his other duties. In accord with the generally accepted view that executive officers may delegate their functions to subordinate officials responsible to them, we think it clear, and the cases so hold, that a detention order issued by a boarding inspector on behalf of the immigration officer in charge, as in this case, sufficiently complies with Section 20. *Indemnity Insurance Co. of North America* v. *United States, supra; Lloyd Royale Belge Societe Anonyme* v. *Elting, supra; The City of Harvard*, 52 F. (2d) 461, 462 (S. D. N. Y.).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General.
TOM C. CLARK,
Assistant Attorney General.
ROBERT S. ERDAHL,
Special Assistant to the Attorney General.
IRVING S. SHAPIRO,
Attorney.

NOVEMBER 1944.

APPENDIX

The Immigration Act of 1924, 43 Stat. 153, as amended (8 U. S. C. 166, 167, 203, 215, 222) provides in part:

> SEC. 3. When used in this Act the term "immigrant" means any alien departing from any place outside the United States destined for the United States, except * * * (5) a bona fide alien seaman serving as such on a vessel arriving at a port of the United States and seeking to enter temporarily the United States solely in pursuit of his calling as a seaman * * *.
>
> * * * * * *
>
> SEC. 15. The admission to the United States of an alien excepted from the class of immigrants * * * shall be for such time and under such conditions as may be by regulations prescribed * * * to insure that, at the expiration of such time or upon failure to maintain the status under which admitted, he will depart from the United States * * *.
>
> * * * * * *
>
> SEC. 19. No alien seaman excluded from admission into the United States under the immigration laws and employed on board any vessel arriving in the United States from any place outside thereof, shall be permitted to land in the United States, except temporarily for medical treatment, or pursuant to such regulations as the [Attorney-General] may prescribe for the ultimate de-

parture, removal or deportation of such alien from the United States. * * *

SEC. 20. (a) The owner, charterer, agent, consignee, or master of any vessel arriving in the United States from any place outside thereof who fails to detain on board any alien seaman employed on such vessel until the immigration officer in charge at the port of arrival has inspected such seaman (which inspection in all cases shall include a personal physical examination by the medical examiners), or who fails to detain such seaman on board after such inspection or to deport such seaman if required by such immigration officer or the Attorney General to do so, shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of $1,000 for each alien seaman in respect of whom such failure occurs. No vessel shall be granted clearance pending the determination of the liability to the payment of such fine, or while the fine remains unpaid, except that clearance may be granted prior to the determination of such question upon the deposit of a sum sufficient to cover such fine, or of a bond with sufficient surety to secure the payment thereof approved by the collector of customs.

* * * * *

SEC. 24. The Commissioner of Immigration and Naturalization, with the approval of the Attorney General, shall prescribe rules and regulations for the enforcement of the provisions of this act; but all such rules and regulations, insofar as they relate to the administration by consular officers, shall be prescribed by the Secretary of State on the recommendation of the Attorney General.

The Act of May 22, 1918, 40 Stat. 559 (22 U. S. C. 223) provided in part:

> When the United States is at war, if the President shall find that the public safety requires that restrictions and prohibitions in addition to those provided otherwise than by this Act be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or Congress, be unlawful [1]—
>
> (a) For any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President shall prescribe.
>
> * * * * *

The Act of March 2, 1921, 41 Stat. 1217 (22 U. S. C. 227) provides in part:

> The provisions of the Act approved May 22, 1918, shall, in so far as they relate to requiring passports and visas from aliens

[1] This paragraph was amended by the Act of June 21, 1941, c. 210 § 55 Stat. 252 (22 U. S. C. 223, Supp. III) to ead as follows:

When the United States is at war or during the existence of the national emergency proclaimed by the President on May 27, 1941, or as to aliens whenever there exists a state of war between, or among, two or more states, and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this Act be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or Congress, be unlawful—"

seeking to come to the United States, continue in force and effect until otherwise provided by law.

Executive Order 8429 issued June 5, 1940, 5 F. R. 2145, provides in part:

DOCUMENTS REQUIRED OF BONA FIDE ALIEN SEAMEN ENTERING THE UNITED STATES

By virtue of and pursuant to the authority vested in me by the act of May 22, 1918, 40 Stat. 559, as extended by the act of March 2, 1921, 41 Stat. 1205, 1217, I hereby prescribe the following regulations governing the entry of alien seamen into the United States:

* * * * *

An alien seaman who is not exempt from the passport and visa requirements under Part I hereof shall be required to present an identifying travel document in the nature of a passport, showing his nationality and identity and bearing his fingerprints, before he may be granted shore leave for any purpose. The travel document shall be surrendered to the immigration authorities by each seaman at the time of landing and returned to him, upon personal application, at the time of departure.

* * * * *

This order shall take effect immediately and shall supersede and cancel Executive Order No. 7797 of January 26, 1938, entitled "Documents Required of Bona Fide Alien Seamen Entering the United States."

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CHARLES ELMORE CROPLEY

IN THE

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OCTOBER TERM, 1944.

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v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY BRIEF FOR THE PETITIONER.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 606

NATIONAL SURETY CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA.

REPLY BRIEF FOR PETITIONER.

The brief in support of the petition for a writ, in compliance with the rules, confined itself to a seven-page direct and concise discussion of the reasons why a writ should be granted to bring the case before the Court for considered action on the questions involved. It did not attempt a full discussion of the merits. This seems to conform to the accepted practice of this Court. *C. B. Kennemer et al.* v. *C. B. Billington*, decided October 9, 1944.

The answering brief, served and filed out of time, implicitly admits the conflict of decisions in the Courts below as outlined in the petition and does not deny the importance of the questions involved. Rather its seventeen pages are devoted largely to a discussion of the merits of the case as though the petition had already been granted. If the Court should deny the petition on the basis of the government's brief, the petitioner would be deprived of an oppor-

tunity to present its case on the merits, since it is believed inappropriate to offer a full presentation of the case at this stage, even if time permitted.

A Review of the Government's Brief.

As we view the government's brief, it amounts to a tacit admission that adequate grounds exist for the issuance of a writ and that the Court below erred in its primary proposition that defenses of the principal were not open to the surety. This seems evident because the brief is principally devoted to a discussion of the very defenses that the Court below held were precluded. Such a discussion appears premature at this time, but having been presented, it seems necessary to point out, briefly, some of the errors inherent in it.

The notice to detain the seaman Pauruga was issued only five days after the promulgation of Executive Order 8429. He was at sea at the time the Executive Order was issued on January 5, 1940 and had no opportunity to obtain a passport, R. 41, 42. This probably is the first case that arose after the issuance of Executive Order 8429. Since that time several hundred cases have arisen on notices to detain based solely on that Executive Order or regulations of similar nature, in many instances under circumstances that resulted in sit-down strikes or mass desertions by violence for which large fines are claimed, sometimes amounting to as much as $15,000 on a single arrival. The case therefore is one of serious importance.

The question of the effect of Executive Order 8429 is one of first instance, except as it has been inferentially decided contrary to the view of the Court below in the case of *Johnson* v. *Keating*, 17 F. (2d) 50 (C. C. A. 1) and the opinion of Attorney General Jackson, 39 Op. 509, 515, 516.

On the merits, we have the question of whether Executive Order 8429, founded explicitly on the wartime Act of May 22, 1918, which had its own provisions for enforcement, as supplemented by the Act of March 2, 1921, which did not carry the penal provisions forward, can or should be enforced by the penalty provided by Section 20 (a) of the Immigration Act of 1924.

The government recognizes that the Act of May 22, 1918 was not in effect at the time Executive Order 8429 was issued, because the United States was not then at war. A provision in the Appropriation Act of March 2, 1921 had kept in effect the passport and visa requirements for aliens which had been provided under the 1918 Act, until otherwise provided by law. It did not empower anyone to prescribe further regulations. The penalties of the 1918 Act were not preserved. *Flora* v. *Rustad* (C. C. A. 8), 8 F. (2d) 335, *United States* v. *One Airplane, etc.*, 23 F. (2d) 500.

The government also concedes (Brief, p. 8) that the 1921 Act was superseded by the Immigration Act of 1924 in so far as it related to documentary requirements for immigrants, but it makes the illusory contention that this was not so with respect of alien seamen because they are now classified as non-immigrants. The short answer to this is that no classification of aliens as immigrants and non-immigrants was ever made until 1924. The 1921 Act did nothing more than to preserve the documentary requirements for aliens as they then existed. No law or regulation at that time required passports for bona fide alien seamen. On the contrary they were expressly excluded from passport requirements by the joint order of the Secretary of State and the Secretary of Labor issued July 26, 1917. See Immigration and Nationality Laws and Regulations as of March 1, 1944, pages 204, 206. Since the government

concedes that no authority can be found for Executive Order 8429 in the Immigration Act of 1924, how can it logically contend that the authority exists in the 1921 Act, which also did not provide for passports or authorize any change in the then existing requirements?

The fact that the Executive Order did not have any statutory foundation as was recognized by the Congress by the Act of June 21, 1941, amending the Act of May 22, 1918 to make it applicable in times of national emergency not limited to war. Public Law 114, 55 Stat. 252. That was more than a year after the Executive Order was issued.

Taking a different line of argument, the Government admits that no foundation can be found in the Immigration Act of 1924 for the promulgation of Executive Order 8429. It further contends that there are no provisions in the Immigration Act of 1924 under which the immigration service could issue regulations of the nature provided in Executive Order 8429. From that premise it proceeds to the proposition that an executive order may be invoked to supply the supposed deficiency and be enforced through the sanctions of the very Act that it says does not grant power for the issuance of such a regulation. It even points out, page 11, that the immigration service has promulgated further regulations based on the Executive Order, rather than on any provision of law, thus building up a system of immigration regulations that the government itself states are beyond any authority granted by the immigration laws.

If this proposition is correct, as it may be because, as hereafter pointed out, the Congress in passing the 1924 Immigration Act rejected a provision requiring passports for alien seamen, it follows by necessary corollary that such regulations cannot be enforced through the penalties provided by the immigration laws.

The difficulty with the Government's position in this aspect is that it reads itself out of the basic immigration laws and pins its faith on a wartime act that was not in force at the time Executive Order 8429 was issued, the penal provisions of which were eliminated by the Act of March 2, 1921, and then seeks to enforce the Executive Order by resort to penalties provided by Section 20(a) of the Immigration Act of 1924, which it says contains no provision for the issuance of such regulations.

In an attempt to buttress this astonishing proposition, it refers to Section 25 of the Immigration Act of 1924, brief page 13. Lines 5, 6, 7 and 8 of that section as quoted in the brief provide for a complete destruction of the argument for, under that section, if Executive Order 8429 and the Acts on which it is based come within the category of other immigration laws, they are to be enforced pursuant to their own provisions, not by the penalties provided by the Immigration Act of 1924.

It will be shown on full presentation of the case that when the Immigration Act of 1924 was up for consideration before the Congress, a proposal that alien seamen should be required to have documents in the nature of passports, as a condition of shore leave was considered and rejected. Consequently, it cannot be lightly concluded that when Section 20(a) of that Act was adopted, it was the intention of the Congress that the penalties therein provided could be invoked for the enforcement of a regulation requiring passports for alien seamen.

As pointed out in our brief in support of the petition, there is nothing in Executive Order 8429 to indicate that it contemplated enforcement through the immigration laws. The Act on which it was based contained certain penal provisions, none of which would have been applicable to the

circumstances here involved, and even those penal provisions were not in force after the passage of the Act of March 2, 1921. *Flora* v. *Rustad,* 8 F. (2d) 335; *United States* v. *One Airplane &c.,* 23 F. (2d) 500.

The Executive Order, if it has any effect, is nothing more than a directive for the guidance of the enforcement section of the immigration service. The penalty of deportation is available against aliens who are found unlawfully in the United States, but there is nothing in the immigration laws that warrants the imposition of fines against carriers in the circumstances of this case.

Furthermore, it is inconsistent with the established attitude of the Government towards its allies, as exemplified by such examples as the Lend Lease policy, to suppose that the President, in issuing Executive Order 8429, should have intended that it would be enforced against shipowners of our allies by placing on them the burden of imprisoning large numbers, sometimes an entire crew of bona fide seamen, and imposing heavy fines on account of those who might succeed in escaping, simply because the seamen, usually because of ignorance or other excusable reasons had not provided themselves with passports. Indeed, it is rather surprising that the Department of Justice should want to commit the Government to such a position.

Much time and ingenuity have been expended in attempting to support Executive Order 8429 as a basis for the imposition of fines under section 20 (a) of the Immigration Act of 1924.

The Board of Immigration Appeals wrote two separate opinions on the subject. It first decided that the 1924 Act did not supersede the previous Acts in so far as non-immigrants were concerned. When shown that there was no such thing as a non-immigrant until 1924 it withdrew

from that position and upheld the Executive Order simply by stating, "We accept without question the validity of this order. Other orders issued under the same authority have been upheld as valid." M. V. Darima and other cases, No. 56096/807-861-803-251; 56118/13. The District Court in this case did not follow either theory advanced by the Board of Immigration Appeals, but adopted a theory of its own which did not find favor with the Circuit Court of Appeals. The present brief of the government, without relying on reasoning advanced by either of the courts below, falls back on the abandoned theory of the Board of Immigration Appeals and an entirely new theory of its own. In view of this history it can hardly be said that the question has been put at rest.

With respect to the power of a boarding inspector to issue a valid order to detain, little further need be said at this time. The brief in support of the petition summarily points to the questions involved.

The government's brief says that our position on this question is predicated on a wholly unrealistic approach, on the theory that the immigration officer in charge could not personally perform such functions in addition to his other duties when several ships might be docked in the same port. Such a suggestion was made by Judge Manton in *Lloyd Royal Belge etc.* v. *Elting*, 61 F. (2d) 745. But it overlooks the fact that the immigration officer in charge in such matters, does not act personally, but acts through Boards of Special Inquiry (Sec. 17, Immigration Act of 1917, 8 U. S. C. 153) and is therefore equipped to and does deal with very large numbers of aliens, including passengers, without difficulty. In practice, these boards have always passed on the eligibility of all aliens, immigrant and non-immigrant except seamen. No practical difficulty is involved, and this was

recognized by the Court of Claims in *Rio Cape Line, Ltd.*, v. *United States*, 89 Ct. Cls. 307, 316 and 317 in the face of two or three decisions to the contrary.

CONCLUSION.

It is submitted therefore that the petition for a writ of certiorari should be granted as prayed.

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